WENCHES BIN B. LAJINGAH

v.

ALL PERSONS IN OCCUPATION OF THE LAND HELD UNDER NT1596 IN THE DISTRICT OF TAWAU

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN J.
[ORIGINATING SUMMONS NO. T(24) - 24 OP 1993]
9 SEPTEMBER 1993

PRACTICE & PROCEDURE; Application for vacantpossession • 0.89 r. 2 Rules of the High Court 1980 - Defendants alleging fraud and forgery - Whether therewere triable issues - Whether application should be allowed.

The plaintiff was the successful bidder for the land in question at an auction held on 22 April 1993. The plaintiff having registered himself as the owner sought to recover vacant possession of the land in question and took out an originating summons under 0. 89 r. 2 of the Rules of the High Court 1980 (RHC 1980).

The defendants who were occupiers of the said land opposed the application and claimed a right to occupy the said land as a result of permission given by the owner of the said land and stated that they had been in occupation since 1952. The question that arose was whether the defendants had raised a triable issue.

Held:

[1] The allegation in the affidavits filed on behalf of the defendants to the effect that the owner of the land had passed away in 1955 and could not have executed the charge in 1982 and that the owner of the said land could not have the identity card as stated in the charge as one of the occupiers is the bearer of the identity card bearing the number stated in the charge are triable issues.

[2] If, as contended by the occupiers, the charge was a forgery, it calls into question the validity of the ownership by the plaintiff of the said land the resolution of which would in turn decide whether the occupiers can remain on the said land.

[3] In the circumstances evidence would have to be led in Court to resolve the issues and O. 89 RHC 1980 was not the proper procedure as a writ of summons would be more appropriate.

[Plaintiffs application dismissed with costs].

Case referred to:
Bohari bi Taib & 5Ors. v. Pengarah Tanah dan Galian Selangor [1991] 1 CLJ 647 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, 0.89 r. 2

For the plaintiff - Francis Chia Kee Tat; M/s. Lawrence Chai & Peter Soong
For the occupiers - Basalie Hj. Ab. Hamid; M/s. Ansari & Co.

JUDGMENT

Ian H.C. Chin J:
The plaintiff on 12 July 1993 took out an Originating Summons under 0.89 r. 2 of the Rules of the High Court 1980 and applies for:

> an order that he do recover possession of the land comprised in and held under Tawau Native Title No. 1596 together with seven un-numbered houses erected thereon and situated at Tanjong Batu, Tawau on the ground that he is entitled to possession and the persons in occupation are in occupation without licence or consent.

The plaintiff became the registered owner of the said land when he was by a memorial No. 10005266 entered in the Register of Native Titles as the transferee pursuant to an order of the Assistant Collector of Land Revenue which order was made consequent upon the plaintiff successfully bidding for the said land in a public auction held on 22 April 1993. The title to the said land has the name of the first owner spelt as "Hunan binti Abdul Samat". A "Munah binti / Abdul Samat @ Maimunah Binte Samad" on 5 August 1982 executed a memorandum of charge ("the charge") charging the said land to the Sabah Bank Berhad as security for a loan of RM100.000 to a Restoran Anika. The said "Munah binti Abdul Samat @ Maimunah Binte Samad" is stated in the charge to have the Identity Card No. H 0193404 and to have the old Identity Card No. 128252. The charge was, by a memorial No. 10003275, registered against the title to the said land on 7 August 1982 in the Register of Native Titles, Tawau. The said Restoran Anika apparently defaulted in the repayment of the said loan because the Assistant Collector of Land Revenue ordered, under the provisions of the Land Ordinance of Sabah and at the instant of the Sabah Bank Berhad, a sale of the said land by public auction. The auction was unsuccessfully held 13 times between 16 December 1986 and 29 September 1992. As stated earlier, it was only on 22 April 1993 that the auction was successfully held and the plaintiff was the successful bidder. The plaintiff by his advocates letter dated 26 May 1993 asked whoever was occupying the said land to vacate the said land within one month of the said letter. This request was not complied with. The plaintiff maintains that the occupiers are occupying the said land without his licence or consent. There are seven houses erected on the said land. Those facts are gleaned from the affidavits respectively of the plaintiff sworn to on 8 July 1993 and of an advocate, Paul Kan Yau Fah, sworn to on 6 August 1993 and filed on behalf of the plaintiff.

Five persons ("the Occupiers") who were not named in the originating summons and who claim to be occupying the said land deposed, separately and together, three affidavits in opposition to the plaintiffs application. These affidavits are:

(1) one sworn on 26 July 1993 by a Maimunah Bte Samad (NRIC No.H0193404);
(2) one sworn jointly on 26 July 1993 by Mahat Bin Samt, Marsi Bte Samat, Abdullah Bin Samad and Hamisa Bte Samat; and
(3) one sworn jointly on 4 August 1993 by all the persons referred to in (1) and (2).

I dismissed the various preliminary objections of the plaintiff with regards to the said affidavits of the Occupiers which are defective and with regard to the failure of the Occupiers to apply to be joined as defendants; those are purely procedural mistakes which I prefer to overlook so as not to waste precious judicial time and I instead prefer to look at the merits of the matter herein. The contentions of the Occupiers, as gathered from their said affidavits, can be summarised as follows:

(1) the owner of the said land, who had since died, was known only as Munah Binti Abdul Samat (and not Munah Binti Abdul Samat @ Maimunah Binti Samat);
(2) they are respectively the sister, nephews and nieces of the said owner of the said land;
(3) they have been and still are occupying the said land with the consent of the said owner since about 1952;
(4) the charge of the said land was done without their knowledge and without consulting them as the lawful beneficiaries; and

(5) the charge and the auction are questionable as the name of Maimunah Bt Samad (one of the Occupiers) was appended as an alias of the registered owner and the identity card number of Mainuah Bt Samad was used for the charge.

Mr. Basalie Hj Ab. Hamid, Counsel for the Occupiers, deposed an affidavit on 18 August 1993 to state as follows, (faithfully reproduced with all its imperfections):

1. That I am the defendants' Advocates herein and I am duly authorised to make this affidavit the fact deposed to herein are true and/or true to the best of my knowledge.
2. That I make this affidavit on behalf of the defendants as to the contentions nature therein.
3. I crave leave to the affidavit of Paul Kan Yau Pah and say that the same does not fully disclose the full facts identifying names and figures and which contain only the half truth. The whole circumstances has been deliberately left out by the said Paul Kan which is quite unconscionable thus fettering and clogging the due process of this Honourable Court.
4. The series of transactions indicated by Paul Kan is void ab initio and has no legitimate expectation to legalize imperfect transactions which are still void and untenable.
5. It is quite repugnant that conveyancing transactions as done in this manner without proper searches and enquiries can be legitimised by the Honourable Court.
6. It has been pointed out in the affidavit of Maimunah Bte Samad sworn to on 26 July 1993 that the series of transactions leading to the public auction are fraught with illegalities and which I now wish to point out more specifically.
7. The registered owner of NT1596 at Tg. Batu, Tawau was Munah Binti Abdul Samat since 1954 when grant to the title was first issued. The said Munah Bte Abdul Samat is not known by any other names or aliases and does not hold a National Registration Identity Card as Identity Cards are not known of during her time. A copy of the title deed is annexed hereto and marked as exhibit 'A'.
8. The charge created in favour of SBB, T awau and done by Paul Kan indicate the names Munah Binti Abdul Samat @ Maimunah Binti Samad granting facilities to Restoran Anika. The said Paul Kan had caused NT1696 to be registered under the name of Munah Bte Abdul Samat to be purportedly executed by Munah Binti Abdul Samat @ Maimunah Binti Samad. The charge is annexed hereto marked as exhibit's B. The two names which are of two persons have been lumped together with fraudulently thus indicating a mala fide intention to make a living person execute the charge the property which is that of a dead person.
9. The registered owner of the land NT1696 Munah Binti Abdul Samat has died since 1955 and possessed no Identity Card.
10. There is a living person by the name of Maimunah Bte Samad who is the sister of the Munah Binti Abdul Samat - deceased who is the holder of Identity Card No H0193404. A copy of the said 1C is annexed hereto marked 'C'.
11. As it now clearly appears that it was not the registered owner who executed the charge and who cannot, there has been a conspiracy by all parties involved in the transaction to produce a well 'thearted' document to obtain a pecuniary advantage by fraud.
12. The auctions are apparently carried out in the purported toyed' names and conditions of sale in the name as well and as there is a miss the legality of the transactions are questionable.
13. The defendants only know that they will be displaced of their land when this O/S was served on them. They have not known all the while the unsuccessful auctions since 1986 and who are illiterates.
14. I crave leave to paragraph 8 of Paul Kan's affidavit and say that Paul Kan has attempted to hide a large well pepertrated false transaction by claiming typing error. He has not only failed to explain the alias appearing in the registered owner's name but has maliciously and frivolously attempted to cover it up.
15. And as such the plaintiff lacks *locus standi* to claim possession as the transactions are *void abinitio.*
16. Therefore I pray that the plaintiffs originating summons be dismissed with costs.

As a result of the several affidavits filed by and on behalf of the Occupiers which I have just referred to, it appears that the Occupiers claim a right to occupy the said land as a result of permission given by the owner of the said land and had occupied the said land since 1952. Encik Basalie also went on oath to say that the owner of the said land had passed away in 1955 and could not have executed the charge in 1982 and that the owner of the said land could not have the identity card as stated in the charge since one of the Occupiers is the bearer of the identity card having the number stated in the charge. These, together with those against Paul Kan

which are set out in Encik Basalie's affidavit, are very serious allegations. If the charge is a forgery, as contended by the Occupiers and as asserted on oath by Encik Basalie, it calls into question the validity of the ownership by the plaintiff of the said land; the resolution of which question would in turn decide whether the Occupiers can remain on the said land. Those are therefore triable issues for which 0.89 of the Rules of the High Court 1980 is not the proper procedure. See *Bohari hi Taib & 5 Ors. v. Pengarah Tanah dan Gallon Selangor* [1991] 1 CLJ 647. Evidence will have to be lead in Court to resolve the issues which I have highlighted in this matter. A writ of summons is more appropriate. I therefore dismiss the application of the plaintiff with costs.